DR WOO KIN CHONG

v.

MARY OU HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM JC
[ORIGINATING MOTION NO: R3-25-47-97]
26 AUGUST 1997

CIVIL PROCEDURE: *Originating motion - Arbitration - Application to set aside award - Whether stating grounds mandatory - Rules of the High Court 1980, O. 69 r. 4 ('the RHC') - Whether notice of preliminary objection required - Order 32 r. 13(2)(b) of the RHC*

CIVIL PROCEDURE: *Affidavits - Whether affidavit stating grounds of notice could cure defective notice of motion - Whether defective application to amend notice could cure irregularity in notice*

The applicant had applied by way of an originating motion, under ss. 23 & 24 of the Arbitration Act 1952, to have the Arbitrator's award set aside. The sections are governed by Rules of the High Court 1980, O. 69 r. 4 (RHC). The original motion was supported by the applicant's affidavit. An affidavit in reply was filed by the respondent. Before the hearing of the merit of the application the respondent raised a preliminary objection, in that the applicant had failed to comply with O. 69 r. 4 of the RHC by not stating the grounds of the application in general terms in the notice of motion. The respondent submitted that the provision O. 69 r. 4(2) of the RHC is mandatory and strict compliance is required and in the absence of the grounds in the body of the motion there was no valid application before the court, to set aside the award. The applicant contended that the notice of the preliminary objection was not given within the fourteen days period, under O. 32 r. 13(2)(b) of the RHC and thus any irregularity was waived by the conduct of the respondent. Further it was argued that compliance with O. 69 r. 4(2) of the RHC need not be strictly enforced for the omission of the grounds in the motion was merely an irregularity curable under O. 2 r. 1 of the RHC.

Held:

[1] A preliminary objection raised through an affidavit and not through an application to set aside an irregularity, under O. 2 r. 2(1) of the RHC would not be caught within the scope of O. 32 r. 13(2)(b) of the RHC. Order 32 r. 13(2)(b) is applicable to interlocutory applications in chambers, and not to originating motion. The respondent's preliminary objection was raised through an affidavit and the court was satisfied that there was sufficient prior notice of the objection.

[2] A motion under O. 69 r. 4 of the RHC is synonymous to an appeal and is a special provision relating to an application to remit or to set aside an award of an arbitrator. The provision under the rule is mandatory and strict compliance is required. Therefore the notice of motion filed by the applicant must contain the grounds of the application. A notice without the grounds is incomplete and irregular, and an incomplete notice is as good as no notice at all.

[2a] An affidavit is a separate document from the notice of motion, and its purpose is to verify the facts in the grounds. The affidavit cannot supply the missing grounds which are required to be set out in the notice of motion. The supporting affidavit of the applicant had set out the grounds in a comprehensive manner, but the deficiencies in the notice of motion could not be regarded as cured by reason of reference to the affidavit attached or accompanying the notice of motion.

[2b] The application of the applicant to amend the original notice of motion was defective as the grounds were not inserted. The omission to state the grounds in the notice is a fundamental and serious irregularity which needed to be amended by formal application in writing. The court was not prepared to accept the notice of motion as a valid application without amendment. The application which was filed to amend the notice of motion did not regularize it and consequently there was no valid application before the court to set aside the arbitration award.

[3] The preliminary objection was allowed. The originating motion and the application for amendment were struck off.

Cases referred to:

Harmsworth v. Harmsworth [1987] 3 All ER 816 ***(refd)***

Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 ***(refd)***

Low Chang Hian v. Kelab Golf Di Raja Selangor [1996] 2 CLJ 309 ***(refd)***

Ooi Chew Seng v. Ultratech Sdn Bhd & Ors [1997] 5 CLJ 421 ***(refd)***

Syarikat M Mohamed v. Mahindapal Singh & Ors [1991] 1 CLJ 582 ***(foll)***

Legislation referred to:

Arbitration Act 1952, ss. 23, 24

Rules of the High Court 1980, O. 2 rr. 1(2), 2(1), O. 32 r. 13(2)(b), O. 52 r. 2(2), O. 69 r. 4(2)

For the applicant - Prakash Metha; M/s Prakash Baljit & Co

For the respondent - Wong Yee Chua; M/s Lim Cheng Chuan & Co

Reported by Michele Saw

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JUDGMENT

Nik Hashim JC:

The application in encl. 2 is an originating motion to have the arbitrator's award dated 29 January 1997 set aside. The application is made under ss. 23 b and 24 of the Arbitration Act 1952 and governed by O. 69 r. 4 of the Rules of the High Court 1980 (the RHC). The originating motion is dated 11 March 1997 and supported by the applicant's affidavit. The respondent has filed an affidavit in reply affirmed by Dr. Tan Kok Peng on 9 May 1997.

c Before hearing the merit of the application, the respondent raised a preliminary objection, ie, the applicant failed to comply with O. 69 r. 4(2) of the RHC in not stating the grounds of the application in general terms on the notice of motion.

Order 69 r. 4(2) of the RHC states:

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> In the case of every such application, the notice of motion must state the grounds of the application; and, where the motion is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with that notice. (Emphasis added).

In the body of encl. 2, the applicant merely stated:

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> Dan selanjutnya ambil perhatian bahawa alasan-alasan bagi permohonan ini adalah disokong di dalam affidavit Dr. Woo Kin Chong yang diikrarkan pada 10 Mac 1997.

Learned counsel for the respondent contended that the provision of O. 69 f r. 4(2) is mandatory and strict compliance is called for, and in the absence of the grounds in the body of the motion, there is no valid application before the court to set aside the award. The following relevant cases were cited in support:

(i) *Ooi Chew Seng v. Ultratech Sdn. Bhd. & Ors.* [1997] 2 MLJ 344;

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(ii) *Syarikat M. Mohamed v. Mahindapal Singh & Ors.* [1991] 2 MLJ 112

(iii) *Kassim bin Sulong & Anor. v. Guthrie Estates Holdings Ltd. & Ors.* [1993] 3 MLJ 303

h Learned counsel for the applicant complained that the notice of preliminary objection was not given within reasonable time within 14 days period fixed under O. 32 r. 13(2)(b) of the RHC, and therefore any irregularity has thus been waived by the conduct of the respondent. He further argued that objection is highly technical in nature, and as such, compliance with O. 69 r. 4(2) need

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not be strictly enforced. According to him, the omission of the grounds in the motion is merely an irregularity which is curable under O. 2 r. l and urged the court to proceed hearing the case on its merits.

With regard to the objection to the notice of preliminary objection, I am satisfied that there was a sufficient prior notice of the objection through the affidavit of Dr. Tan Kok Peng filed on behalf of the respondent, and that ample time was given to the applicant before the objection was raised (see *Ooi Chew Seng*). What the respondent did in this case was that he raised the preliminary objection through an affidavit and not an application to set aside for irregularity under O. 2 r. 2(l). Thus, the respondent's affidavit in reply was not caught within the scope of O. 32 r. 13(2)(b) which is only applicable to interlocutory application in chambers and not to originating motions as in the present case. (see *Low Chang Hian v. Kelab Golf Di Raja Selangor* [1995] 3 MLJ 1).

The applicant's counsel contends that the respondent is not prejudiced or embarrassed by the non-compliance and that the grounds of the application have been set out in a comprehensive manner in the supporting affidavit of Dr. Woo Kin Chong.

By analogy, the case of *Syarikat M. Mohamed v. Mahindapal Singh & Ors.* [1991] 2 MLJ 112 is illuminative of the requirement for the grounds in the notice of motion. In that case, the plaintiff applied by motion to commit the first and second defendants to prison for contempt of court for breach of injunction. In the statement accompanying the notice of motion the plaintiff failed to state the grounds on which an order of committal is sought as required by O. 52 r. 2(2) of the RHC. YA KC Vohrah J, in that case in the course of his judgment referred to an English case of *Harmsworth v. Harmsworth* [1987] 3 All ER 816 where Nicholls LJ underscored the principle that deficiencies in the notice of motion cannot be regarded as cured by reason of references in the notice of motion to affidavits attached or accompanying the notice. The learned British judge at p. 821 said:

> ... But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. ... the rules require that the notice itself must contain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself.

YA KC Vohrah J in dismissing the motion in *M. Mohamed's* case at p. 115 said:

> No doubt the notice of motion has made reference to the affidavit of Moiz Tahir Ali and the affidavit has been served on the defendants but the point is that the document is a wholly separate document from the notice and the statement and its purpose is merely to verify the facts in the statement; it cannot supply the missing grounds which are required to be set out in the statement under r. 2(2) of O. 52 of the RHC.

I, with respect, agree with the ruling of the learned judge in that case and would apply the same principle to the present case. Though that case was quasi-criminal in nature, that does not make it less imperative to comply with the rules in a case that is purely civil in nature. In my view, a motion under O. 69 r. 4 of the RHC is synonymous to an appeal. O. 69 r. 4(2) is a special provision relating to application to remit or set aside an award of an arbitrator. By its terms the provision under the rule is mandatory and therefore obligatory. That being so, strict compliance with its provision is called for (*Ooi Chew Seng's* case). Accordingly, the notice of motion must contain the grounds. This is a basic requirement. The grounds must be stated within the four corners of the notice itself. Affidavit is not a ground, but it contains evidence. It is a separate document from the notice and its purpose is to verify the facts in the grounds. The affidavit cannot supply the missing grounds which are required to be set out in the notice of motion under r. 4(2) of O. 69 of the RHC. The rule requires only grounds in general terms to be stated in the notice itself. The notice without the grounds is incomplete and irregular. An incomplete notice is as good as no notice at all. One of the reasons for the grounds is because an arbitration award is considered to be final and could only be challenged on very limited grounds. If upon perusing the grounds stated on the notice it is found that there are no valid grounds, the court need not go into the affidavit evidence and exercise a minute examination to see whether the application should be granted but could instead dismiss the application outright. Counsel for the applicant said that the rule only requires that the grounds should be stated in general terms but the applicant has in fact set out such grounds in a comprehensive manner in the supporting affidavit. The function of an affidavit is to contain evidence and an affidavit which purportedly contains grounds in a comprehensive manner is a far cry from a notice of motion which requires the grounds to be in general terms. Obviously, there are reasons why the rule requires grounds to be stated in general terms and not in a comprehensive manner.

In this case, however, the applicant has filed an application in encl. 8 to make amendment to the originating motion in encl. 2 by supplying the missing grounds in encl. 2. By so doing, the applicant has acknowledged the defects. But unfortunately, encl. 8 itself is defective. Instead of inserting the grounds which are missing, the proposed amendments by its very provision, seek to

introduce further relief leaving the notice of motion in encl. 2 without any grounds and thus it remains unamended. Therefore, encl. 8, being itself defective, cannot cure encl. 2. The defects in encl. 2 are irregularities which can be cured by amendment under O. 2 r. 1(2). However, the omission to state the grounds in the notice is a fundamental and serious irregularity which needs to be amended by formal application in writing. Without amendment, encl. 2 remains irregular and invalid. In the present case, the court is not prepared to accept encl. 2 as a valid application without amendment. By filing the defective application in encl. 8 the applicant did not avail himself of the opportunity to regularise the application in encl. 2. Accordingly, I agreed with the submission of counsel for the respondent that in the absence of the grounds, there is no valid application before the court to set aside the arbitration award. In the event, I allowed the preliminary objection of the respondent and struck off the originating motion in encl. 2 with costs, and further ordered that encl. 8, being itself irregular, also to be struck off with costs.